No. 17-1672

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF RESPONDENT

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Statement of Interest[1]

The Due Process Institute is a non-profit, bipartisan, public-interest organization that works nationwide to honor, preserve, and restore principles of fairness in the criminal legal system. Formed in 2018, the Institute has already participated as *amicus curiae* before this Court in a number of cases raising important constitutional issues, such as *Timbs v. Indiana*, No. 17-1091 (*certiorari* granted June 18, 2018) and *Turner v. United States*, No. 18-106 (petition for *certiorari* pending). Our concern about the law before the Court echoes Justice Black's later-vindicated dissent in *Green v. United States*, 356 U.S. 165 (1958): "[E]xtraordinary authority [may] first slip[] into the law as a very limited and insignificant thing," but unless promptly checked, it may become a "pervasive mode of administering criminal justice, usurping our regular constitutional methods of trying those charged with offenses against society." *Id.* at 194.

Introduction and Summary of Argument

"This case involves basic questions of the highest importance far transcending its particular facts." *Green*, 356 U.S. at 194 (Black, J., dissenting). The regime the United States asks this Court to approve is without precedent and contrary to our Nation's legal tradition. 18 U.S.C. § 3583(k) establishes a proceeding where a person may be sentenced to life in prison without parole, based on a single judge's finding that he "commit[ted] an[] offense" codified in

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and counsel made a monetary contribution to its preparation or submission. The Petitioner has consented to the filing of this brief and the Respondent has filed a blanket waiver.

Title 18 of the U.S. Code. Even a close finding of culpability by a preponderance of the evidence suffices, though that standard has been held constitutionally *inadequate* to impose eighteen months' juvenile detention, *In re Winship*, 397 U.S. 358 (1970), or a contempt fine, *Int'l Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

The sentence authorized is far longer than the maximum Congress authorized for respondent's 2010 conviction under 18 U.S.C. § 2252; it is far more severe than the maximum Congress authorized for a *recidivist* conviction. (Indeed, the Government's appears to take the position that a defendant sentenced to life in a subsection (k) proceeding could be prosecuted and punished additionally under section 2252, Br. 51). And the subsection (k) penalty is different in kind from the revocation sentences provided for any other supervised release violation, including the most serious. Had respondent committed *homicide* while on supervised release under the 2010 conviction, the maximum revocation sentence would have been two years. And even then, the district court would be under no mandate to order revocation or any prison term. Rather, as with every other violation of a supervised release condition, the sentencing decision would be made in light of what the Government agrees is the "predominant goal" of supervised release, "to ease the defendant's transition into the community," S. Rep. 98–225, at 125 (1984), disregarding punishment; and in accord with the "parsimony principle" Congress codified in 18 U.S.C. § 3553(a).

The Government seeks to obscure these stark realities beneath a welter of labels, insisting countless times that subsection (k) entails merely

"administering a sentence," rather than imposing one; that the defendant is not being "prosecuted" within the meaning of the Sixth Amendment; that a court is merely "revoking" the defendant's "conditional liberty," not convicting and punishing him for the offense it has determined he committed.

I. None of that is tenable. As the Court has long taught, when the substance of the Fifth and Sixth Amendments collides with a label, the latter must yield. "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment[—]that all facts essential to imposition of the level of punishment that the defendant receives" must be found beyond reasonable doubt—does not vary, "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane"—or "post-judgment sentencing facts." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

No one looking at the text and structure of subsection (k)—and no one wandering into Judge Kern's courtroom in 2016—would have any doubt that he was adjudicating and imposing punishment for a crime, an "infraction[] of the law, visited with punishment as such." *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.); *id.* ("If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech"). By the same token, no observer would describe what was transpiring as "sentence administration." A judge assigned to preside over a subsection (k) proceeding needs to know next to nothing about the sentence she ostensibly is "administering." The gravity of the conviction offense would be irrelevant, *compare* 18 U.S.C. § 3583(e)(3), as would the length of the

sentence of imprisonment and term of supervised release imposed when the defendant was convicted, or the maximum prison term that *could have been* imposed. Indeed, Judge Kern, in imposing the mandatory five-year sentence here, pronounced it "repugnant" that subsection (k) required respondent's long imprisonment without a jury and proof beyond reasonable doubt. Resp. Br. 2.

In our legal system, imprisonment is presumptively punishment, and when a law provides *longer* incarceration than could be imposed under the criminal code for the same conduct—and the sentence is life and the conduct is "commit[ting] an[] offense"—the inference is irrefutable. It is fanciful to suggest that subsection (k) rests on a congressional judgment about "breaches of trust," but if that were true, defendants would still be entitled to a jury trial and the protection of the beyond-reasonable-doubt proof standard. *See Int'l Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

The Government's claims that it has combed the historical record for a comparable jury trial right betrays a certain obtuseness. Although the subsection (k) regime is facially incompatible with the binding interpretation of the Sixth Amendment established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it does not take an *Apprendi* enthusiast to recognize that a proceeding where a defendant stands to be punished based on a determination of factual guilt or innocence is within "the jury's traditional domain." Br. 31 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)). Rather, the burden is on the Government to identify what, *apart from* a label—*i.e.*, the fact that subsection (k) appears in the supervised release provision of Title 18—distinguishes this proceeding from countless

others where a defendant's imprisonment requires a determination he "commit[ted] an offense under [a] chapter [of Title 18]."

That respondent has "previously been found 'guilty of a crime against the people,'" U.S. Br. 37 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) does not suffice. The Government cannot contend that, in a prosecution under a repeat offender statute, the fact of the defendant's guilt on the *second* offense may be determined without a jury. *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Nor can it be that only persons with "absolute liberty" are fully protected by the Fifth and Sixth Amendments, *see* U.S. Br. 38; there is a long history of affording the full panoply of rights to defendants accused of committing crimes *in prison*, though they occupy a far lower place on the "continuum" of liberty than do persons on post-release supervision.

And, as this Court's decisions concerning punishment for contempt establish, it makes no constitutional difference that the prohibition a defendant is accused of violating appears in a criminal statute, in a judicial decree, or (as here) in both. *See Bloom v. Illinois.*, 391 U.S. 194 (1968). Indeed, to the extent that there is no long history of juries determining alleged transgressions of "do not violate the criminal law" orders, it is because courts long refrained from issuing them, out of deference to the "regular constitutional methods of trying those charged with offenses against society." *Green*, 356 U.S. 194 (Black, J., dissenting). But as that reticence has receded, it has been settled that a defendant accused of violating such an order is entitled to have her guilt beyond a reasonable doubt be determined by

a jury. *See United States v. Dixon*, 509 U.S. 688, 695 (1993).

II. The Government's defense ultimately rests on a different label: "revocation." If subsection (k) only provided that a person (or even someone on supervised release) committing an enumerated offense would be sentenced up to life in prison, the Government presumably would concede, its codification in Section 3583 would not suffice to extinguish defendants' Fifth and Sixth Amendment rights. Rather, the Government argues that because it *also* provides for —automatic—"revocation" upon a determination of guilt and because it references Section 3583(e) (principally to say that section's limitations *do not* apply), a wholly different constitutional analysis should govern, one that permitted parole and probation revocations without juries in *Morrisey* and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)—and that led the Court in *Johnson v. United States*, 529 U.S. 694 (2000), to "appear[] to" see supervised release revocations under subsection (e)(3) as "unproblematic." U.S. Br. 21.

That is wrong. In appearance, the modes of post-release supervision may not have much changed between the federal parole era and the present; nor has the *conduct* of revocation hearings. But, as a matter of constitutional substance, the world is fundamentally different. The features that made parole revocation hearings constitutional—that defendants *could not* be ordered to serve more time in prison than their sentence at trial imposed and enjoyed "conditional liberty" that an *early* but provisional release afforded—were swept away when Congress decided in 1984 that time previously spent on parole (two-thirds of a defendant's sentence) would

have to be served in prison. And release at the end of sentence no longer depends on the defendant's "promise" to comply. Br. 38. Release at the end of a full sentence is a matter of entitlement, and the post-release conditions are binding, with or without the defendant's agreement. Those conditions include measures needed for effective supervision, including searches that would be "unreasonable" under the Fourth Amendment for others, but they don't establish a degraded citizenship status generally and don't extinguish defendants' Fifth and Sixth Amendment rights.

The Sentencing Reform Act also established a brief and discretionary supervised release regime, as a nonpunitive adjunct to supply the supportive rehabilitative interventions that parole previously provided and that some persons would still need on first leaving prison. Congress subsequently added provisions explicitly authorizing sanctions—including imprisonment for "brief periods"—in order not to punish but to promote compliance and make the supervision system operate more effectively.

That is the understanding of the law that the Court adopted, at the Government's urging, in *Johnson*. That case did not raise a Fifth or Sixth Amendment challenge to a prison sentence of any kind, let alone to one like subsection (k), which was not enacted until years later. But to the extent the Court saw the regime before it as untroubling, subsection (k) wipes away all the features that made it so. Under the version of Section 3583 in effect in *Johnson*, and still operative today for almost every alleged supervised release violation, neither revocation nor imprisonment was mandatory; and periods of incarceration were subject to relatively

brief "caps," which were and are determined by the seriousness, not of the (alleged) violation, but rather the offense of conviction. Indeed, under the version of the law in effect when Johnson's supervised release was revoked, those caps applied to aggregates: The most time respondent here could have spent in prison if he repeatedly and seriously violated conditions was two years in total. Those provisions were designed to prevent—and do in fact prevent—what the Government asks the Court to countenance here, a "usurp[ation] of our regular constitutional methods of trying those charged with offenses against society," whereby prosecutors, at their discretion, may obtain severe criminal punishment under a much less rigorous proof standard, based on the views of a "single employee of the [Government]," *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring).

III. The court of appeals here was correct—and the Government is wrong—as to the appropriate remedy. To the extent subsection (k) authorizes an alternative procedure for finding a defendant guilty of committing a federal offense and sending him to prison, it is constitutionally impermissible, full stop. That regime is inconsistent with the jury trial guarantee and the beyond-reasonable-doubt requirement—and numerous other safeguards that traditionally operate when a person is accused of an offense that carries such serious punishment.

It makes no sense, as a matter of constitutional law, congressional intent, or judicial administration, for this Court to invent a different, hybrid procedure for these cases, especially one that grafts some constitutional protections, but not others, onto a procedure designed and suited for making discrete, highly discretionary, and non-punitive adjustments

to a defendant's post-release status. The Tenth Circuit's straightforward resolution imposes no special hardship: It allows the Government to address allegations of repeat Section 2252 violations by persons on supervised release in the same way it treats fresh homicide allegations (indeed, the same way it treats persons whose initial Section 2252 convictions pre-date the 2006 amendments to subsection (k)). A defendant would be subject to criminal trial for that offense *and* subject to revocation and potential further incarceration, based on a preponderance finding that his conduct violated the "do not offend" condition that appeared in the supervised release part of his initial sentence.

ARGUMENT

I. The Determination Subsection (k) Calls For Is One The Constitution Requires Be Made By A Jury, Based On Proof Beyond A Reasonable Doubt

The repugnance Judge Kern expressed on imposing sentence in accordance with subsection (k) was warranted—and consistent with his oath of office. Subsection (k) works a plain and serious violation of the Constitution. As respondent carefully demonstrates, the provision fails the *Apprendi* test in stark fashion: subsection (k) requires defendants to be sentenced to prison for at least five years—in addition to the term that their conviction justified—based on a "particular fact," not found by the jury that rendered a guilty verdict or any other, a fact that this law "makes essential to [the] punishment" imposed. *United States. v. Booker*, 543 U.S. 220, 232 (2005) (quoting 542 U.S. at 301).

The Government does not seriously argue otherwise, and its desultory efforts cannot succeed. The Government posits that this prison term *is* "authorized" by the original verdict, Br. 46—in the sense that a conviction for Section 2252 automatically triggers a term of supervised release, which in turn requires the imposition of conditions and the subsection (k) sentence in the event of a judicially-determined violation of an enumerated offense. But that sort of argument is what *Apprendi* forecloses: The defendant was on notice that a jury's verdict would result in twenty-year sentence *if* the judge found a further aggravating fact by a preponderance of the evidence, just as someone sentenced to the ten-year maximum for Section 2252 would be on notice that he would spend at least fifteen years' imprisonment if a judge found the "particular fact" called for in subsection (k). The fatal Sixth Amendment defect *Apprendi* identified applies fully here: The judge could not, based on the jury findings *alone*, impose the longer sentence. The "'statutory maximum' for *Apprendi* purposes ... *[i]s not* the maximum sentence a judge may impose *after* finding additional facts." *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (emphasis added). *Accord Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt").

The Government's principal argument is not that subsection (k) *satisfies* the Sixth Amendment test *Apprendi* and its progeny establish, but rather that it is exempt from it. The *Apprendi* line, the Government insists, does not require jury determination of "post-judgment sentencing facts," Br. 30—only facts that

could be alleged in an indictment. That is a doubtful description of the *Apprendi* doctrine, and it is a wholly untenable account of the Sixth Amendment. Neither *Apprendi* nor its progeny is fairly read as announcing or enforcing the limit the Government describes. Those opinions said "any" and "all" facts, and all but one *granted* relief to defendants, on the ground that the legislature's designation of an aggravating fact as a "sentencing factor," rather than an element of the offense, could not trump the accused's constitutional right to have punishment limited to the maximum the jury verdict alone allowed. And the lone decision rejecting an *Apprendi* claim, *Oregon v. Ice*, 555 U.S. 160 (2009), hardly supports the Government here. The defendant in that case received two separate sentences, each supported by a jury determination of guilt, and the Court held that the Sixth Amendment did not require jury involvement in deciding whether they should be served consecutively; respondent here received sentences based on one jury verdict and one judicial finding.

The Sixth Amendment problem here is much more basic than what has confronted (and often divided) the Court in *Apprendi* and progeny. The "fact" on which subsection (k) defendants are denied jury determination—and that subjects them to a five-year-to life prison sentence is one that has *never*, under any sentencing regime, been considered a "sentencing factor" or otherwise committed to judge, rather than jury, resolution: whether or not he is guilty of "commit[ting] an offense" established under a chapter of the federal criminal code.

The precedent for having a jury determine *that* question is not scant or hard to find; it is *ubiquitous*—it is what happens—indeed, what the Constitution

demands—in every criminal prosecution under Section 2252 and for every other non-petty offense. That the facts alleged to state an offense under chapter 110 in this and other subsection (k) proceedings are "post-judgment," Br. 20, and thus entirely distinct from ones on which the jury rendered an earlier guilty verdict is not argument *against* jury determination. This Court has considered what the Sixth Amendment requires in cases, like those under subsection (k), where the punishment a defendant faces is based on the fact that he has "already 'been convicted of a crime,'" U.S. Br. 18 (quoting *Gagnon*). In *Almendarez-Torres v. United States*, 523 U.S. 224 (1988), the Court reaffirmed that it is constitutional and appropriate to treat repeat offenses as distinct, aggravated crimes, and further held, over forceful dissent, that when a defendant is accused of being a repeat offender, *that* fact need not be proven to a jury. And so it is where a person previously convicted of Section 2252 is accused for a second time of committing that offense. But nowhere there, or anywhere else, has it been suggested that in such cases, the determinations of *factual guilt* for both offenses requires anything but jury determination, under the beyond-a-reasonable-doubt standard. (Indeed, there is no question that the many other safeguards—including thee rights to a trial in the State and district where the offense occurred, to confront witnesses, and to compulsory process—are also guaranteed). *Compare* Pet. App. 31a-32a (Kelly, J., dissenting) (arguing that it was sufficient that respondent "was tried and found guilty beyond a reasonable doubt of the original offense" and received "the full panoply of rights during his initial criminal proceeding").

Thus, it cannot be denied that a prior conviction for a similar offense does not in itself effect a life-long forfeiture of the Constitution's safeguards against an unfair trial or an unjust conviction arising from "post-judgment" facts. Nor does a conviction effect even a temporary forfeiture. The Government surely does not dispute that if a person just beginning to serve a sentence is accused of committing a similar offense *in prison* is entitled to the "full panoply" of trial protections, *see, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 304 (1995), even though he occupies an unfavorable place on the "'continuum' of state-imposed punishments." *Samson v. California*, 547 U.S. 843, 850 (2006).

Indeed, it is doubtful that the Constitution would allow a defendant to *voluntarily* surrender Fifth and Sixth Amendment rights in future proceedings, in exchange for the valuable benefit of leniency on a pending charge. *Cf. Speiser v. Randall*, 357 U.S. 513 (1958). But subsection (k) does worse than that: It imposes that forfeiture, in many cases for life, on defendants who have no choice in the matter and who have received and served the full punishment for their conviction—including, in some cases, the maximum Congress permitted to be imposed on anyone convicted of the offense. It is incumbent on the Government to articulate a "distinction of constitutional significance," *United States v. Booker*, 543 U.S. 220, 233 (2005), between accused second offenders (1) who either are wholly free *or* still in prison, and (2) those who are on supervised release.

The fact that the latter group are, by virtue of the supervised release "part of the[ir] sentence," under court order to not violate Section 2252 does not supply a constitutionally sufficient distinction. On its own terms, the premise that subsection (k) imposes

punishment for a "breach of trust," and not for committing the offense, warrants maximal skepticism. The penalty authorized is a mandatory prison sentence with a longer maximum than the recidivist Section 2252 criminal offense carries. While no one expects Congress to make "every possible supervised-release violation result in reimprisonment for the *exact* same length of time," U.S. Br. 49 (emphasis added), it is hard to credit that a legislature willing to authorize this punishment would categorically *forbid* district courts from more than two-year sentences for disobeying conditions the court itself imposed or for breaking the "promise" to not commit homicide. Br. 38.

The Government points to no evidence that Congress actually made the "categorical determination" Judge Kelly hypothesized. The condition alleged to have been violated did not derive from the court whose "trust" respondent was alleged to breach, but rather through operation of three statutes Congress enacted, *see* 3583(a) (requiring that persons convicted of sexual offenses serve supervised release); *id.* § 3583(d) (requiring that district courts prohibit); *id.* § 2252 (prohibiting knowing possession of pornographic depictions of minors), and the district court made clear that the breach did not warrant more than two years' imprisonment, Resp. Br. 8, and that it would have acquitted had the criminal proof standard governed. Pet. App. 68a.

But if disobedience *were* the actual basis for imposing punishment, that would not make the regime constitutional. This Court's decision a half century ago in *Bloom v. Illinois*, settled that the Constitution *does* require jury trials and proof beyond a reasonable doubt in cases where disobedience of a

court's order is the basis for imposing punishment. That decision disavowed contrary statements in more than a century of opinions in favor of the logic articulated in Justice Holmes's *Gompers* opinion and Justice Black's *Green* dissent: that judicial "decrees are simply another form of sovereign directive aimed at guiding the citizen's activity" and do not occupy "any higher or different plane than the laws of Congress ... insofar as punishment for their violation is concerned." 356 U.S. at 219.

These cases refute the Government's claims that "post-judgment" jury fact-finding is unheard of or historically anomalous. Indeed, supervised release orders are essentially injunctions, which impose affirmative and prohibitory obligations, not least to refrain from violating criminal laws. Notably, that sort of directive, which now appears in almost every federal criminal judgment—is of recent origin. For centuries, equity courts refused to enjoin crimes, because doing so would necessarily impinge on the regular constitutional means for enforcing criminal laws. *See United States v. Dixon*, 509 U.S. 688 (1993). But in modern practice, alleged violations of those orders are held trigger the same full protections. *See id.* at 695; *see also Bagwell*, 512 U.S. at 843 (Scalia, J., concurring) ("As the scope of injunctions has expanded, they have lost some of the distinctive features that made enforcement through civil process acceptable.").

In fact, even before this Court reversed course in *Bloom*, Congress by statute provided (for cases where the United States is not a party) that persons accused of a contempt that "also constitutes a criminal offense under any Act of Congress, or under the laws of any state [are] ... entitled to trial by a jury, which shall

conform as near as may be to the practice in other criminal cases." 18 U.S.C. § 3691, and further that imprisonment in such cases may not "exceed the term of six months." *id.* § 402. *Cf. Muniz v. Hoffman*, 422 U.S. 454, 475 (1975) (jury trial not constitutionally required for criminal contempt if punishment is less than six months). This 70-year-old federal regime adopts exactly the distinction the Government here brushes aside as making "little sense." Br. 48-49.

Indeed, a further reason for recognizing jury trial rights in contempt cases has special resonance in the subsection (k) setting. As the Court emphasized in *Blakeley*, the Sixth Amendment right is a "fundamental reservation of power in our constitutional structure," and meant to "control the judiciary." 542 U.S. at 305-06. *Accord Apprendi*, 530 U.S. at 547-48 (O'Connor, J., dissenting) (the jury trial guarantee functions "to protect the criminal defendant against potentially arbitrary judges"). In cases like this one, as with contempt, it is a constitutional serious concern, not a virtue, that the person initiating the proceeding—and authorized to determine guilt and punishment—is often the same one whose trust defendant allegedly breached and who previously earlier adjudged the defendant guilty. *Cf.* U.S. Br. 31 (suggesting that the fact revocation "is ordinarily initiated by a judicial officer or the court itself, not by a prosecutor" is reason for withholding jury trial). Because judges "remain human even after assuming their judicial duties," and are not immune to "pettiness and bruised feelings," subsection (k) defendants need the "historic ... bulwark" juries provide at least as much as others do. U.S. Br. 19 (quoting *Ice*, 555 U.S. at 168).

The record in this case raises no immediate concern on that score. The district court appears to have been fair and admirably forthright in its dealings with respondent (though it did commit clear error in its factual finding against him). But the power subsection (k) vests in a single individual—to impose not six months' imprisonment or two years', but rather life without parole, based on his own view of the facts, is wholly extraordinary.[2]

The "historical[] anomal[y]" in this case, U.S. Br. 20, is that a federal statute authorizes life imprisonment without parole based on a judge's belief that a defendant, more likely than not, committed a crime. Subsection (k) replicates the hypothetical regime that all—"even *Apprendi's* critics"—"would reject" as a constitutionally intolerable, "absurd [Sixth Amendment] result," *Blakely*, 542 U.S. at 306: It authorizes the second-most-serious punishment known to the law based on a verdict of guilt for an unrelated Class C felony and a judicial fact-finding. And it implicates the core purposes of the jury-trial

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[2]This is not to suggest that the precise regime governing contempt trials should—or must—be transplanted to supervised release revocation hearings or that defendants are entitled to juries in every proceeding where incarceration is theoretically possible. Many revocation sentences are brief and aimed at securing compliance with conditions, and would thus not trigger jury trial rights if the contempt analogy governed. *See Bagwell*, 512 U.S. at 829. And in many cases where a violation of the "do not re-offend" command is the basis for seeking revocation, the defendant has already been criminally convicted, in which case the *Almendarez-Torres* rule would foreclose any jury plea. *See, e.g., Johnson*, 529 U.S. 697. And it surely is constitutionally significant that the avowed object of the regime in which such proceedings occur, unlike that of civil trials, is to *benefit* the defendant—and that judges' powers are constrained by statute in ways that have no analogue in contempt law.

guarantee and the core competence of the Anglo-American criminal jury:

> [F]rom its numbers, the mode of their selection, and the fact that jurors come from all classes of society, [the jury is] better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be.

People v. Garbutt, 17 Mich. 9, 27 (1868) (Cooley, J.)).

There can be no suggestion here, very much unlike with other claims considered in the Court's recent decisions, that the Sixth Amendment's purposes—or defendants' interests—point in both directions. *See, e.g., Oregon v. Ice*, 555 U.S. 160, 171 (2009) (requiring jury involvement in structured process for making concurrent sentencing decision could reward reversion to wholly discretionary judicial decisionmaking); *Apprendi*, 530 U.S. at 546 (O'Connor, J., dissenting) (objecting that Court's rule affords preferential Sixth Amendment treatment to entirely discretionary judicial sentencing). And there is no countervailing governmental interest comparable to the historic "broad power to define crimes and their punishments," *id.* at 524—only boiler-plate assertions of practical difficulty. But "restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive one of it, are always inconvenient—to the authority so restricted." *In re Oliver*, 333 U.S. 257, 280-81 (1948) (Rutledge, J., concurring).

II. The Revocation Label Does Not Place The Subsection (k) Regime Beyond The Reach Of The Fifth and Sixth Amendments

The Government has identified no constitutionally significant basis for affording drastically different procedures for adjudicating guilt and imposing punishment within the group of defendants who, having previously been convicted of a sexual offense, are accused of committing another.

When the Government nonetheless announces that "history, tradition, constitutional text" all prove the constitutionality of Section 3583(k), its claim is limited to a label-based argument: (1) that *Morrissey* and *Gagnon* held that parole and probation may be revoked based on a judicial determination of a violation; (2) that supervised release revocation is close enough to parole revocation; and (3) that subsection (k) proceedings, in turn, are similar enough to ordinary revocation hearings to keep the Fifth and Sixth Amendments at bay. Indeed, the often-exotic verbal formulations in the Government's brief appear to have been reverse-engineered to reinforce this syllogism: Prison sentences are "deprivations of conditional liberty"; findings of guilt and innocence are "sentence implementation facts"; etc.

But the Government's second and third premises are both wrong. Although the present-day supervised release regime is, in appearance and daily operation, a continuation of earlier mechanisms—imposing restrictions, requirements, and supports to enable successful reintegration—it also operates in a larger framework that is, in almost every way, a deliberate repudiation of its predecessor. Those fundamental differences make supervised release *revocation*

diverge in important and constitutionally significant respects from parole revocation. The features that made the regimes in *Morrissey* and *Gagnon* essentially immune from Fifth and Sixth Amendment invalidation and maintained a sharp division between "sentencing implementation" and criminal law enforcement no longer operate. Instead, the Sentencing Reform Act relies on a suite of statutory provisions that together ensure that revocation and incarceration remain mechanisms ancillary to integrating persons leaving prison and not a means of "usurp[ing] our regular constitutional methods of trying those charged with offenses against society." Those features played a central role in the Government's defense of the supervised release regime in *Johnson*. It is precisely those safeguards that subsection (k) jettisons.

First, while parole was the "precursor" of supervised release as a monitoring regime, U.S. Br. 21, it is error to say that Congress replaced parole with supervised release. Rather, the Sentencing Reform Act replaced parole with *incarceration*. In the pre-1984 era, federal sentencing was indeterminate; courts, "as a general rule, [could] conditionally release a prisoner any time after he serve[d] one-third of the judicially fixed term," *United States v. Grayson*, 438 U.S. 41, 47 (1978); and many defendants in fact served no more than that. *See Barber v. Thomas*, 560 U.S. 474, 482 (2010). The Sentencing Reform Act brought an end to that, "mak[ing] all sentences basically determinate," in the interest of "uniformity and greater honesty.": "The sentence the judge imposes [became] the sentence the offender actually serve[s]." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 367 (1989)). The supervised release regime was in fact a late addition, a recognition that though

Congress meant a decisive break from the individualized, rehabilitative focus of the prior regime, there would still be defendants leaving prison after serving full-term sentences who might benefit from the kind of support and monitoring formerly extended through the parole process. *See generally* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958 (2013).

In contrast, the "essence" of the former parole system was "release from prison, *before the completion of sentence*, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey*, 408 U.S. at 477 (emphasis added); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998) ("In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements."). And that *early* release could be recalled or revoked, and the "prisoner," retaken, in the event of noncompliance, at which point the remainder of the sentence would be reinstated, subject to future parole opportunities. Under that system, what happened in respondent's case—a defendant's being subject to five years' imprisonment *beyond* the term he received on conviction—was inconceivable, indeed logically impossible, let alone serving more time in prison than the statutory maximum for a conviction offense, let alone life without parole.

In a real sense, no Sixth Amendment problem was possible under this system. Upon revocation, a defendant served the unserved portion of his sentence in prison (or out, if subsequently paroled), and he was released. The defendant's overall period of

involvement might exceed the length of his sentence, and the time spent in prison, greater than if he had never violated the terms of parole, but no defendant served more prison time than the verdict of conviction allowed.[3]

Probation was (and is) essentially identical, particularly in cases where the sentence was imposed upon conviction, but its execution is suspended. Probation was generally thought even more advantageous to the defendant than parole, because he might never set foot in prison (rather than serving one-third of a sentence). But like parole revocation, and unlike revocations in the present-day "determinate" regime, the outer limit of a revocation proceeding was reinstatement of the sentence imposed at the time of conviction—with the possibility of parole (and no further supervision once that sentence was served).[4]

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[3] To be sure, defendants whose parole was revoked near the end of their term *were* not entitled to credit for the time they were "on the street," subject to reporting obligations and with less than complete freedom. But defendants whose supervised release is revoked lose that, too, in addition to extra time they serve in prison (and under post-release oversight). It has in any event been this Court's teaching that imprisonment is a uniquely serious form of punishment and that the exchange rate with noncustodial supervision regimes is very steep. *See Granderson v. United States*, 511 U.S 39 (1994); *Frank v. United States*, 395 U.S. 147 (1969).

[4] Ordering probation by suspending *imposition* of sentence was somewhat less defendant-friendly; the defendant still emerged from sentencing with the prospect of never going to prison, but any sentence he did receive would be imposed at a juncture when the court had found a violation warranting revocation. That, presumably, is why the Court in *Mempa v. Rhay*, 389 U.S. 128 (1967), treated such proceedings differently than the ones in *Gagnon*, notwithstanding the "post-judgment"

There were many serious objections to that sentencing regime, including to the administration of revocation hearings.[5] But revocation proceedings of the kind before the Court in *Morrissey* and *Gagnon* were *per se* compliant with *Apprendi*. Moreover, without minimizing the individual hardship of being returned to prison, it is not hard to see how many courts saw parole revocation as more a breach-of-contract remedy rather than a punishment. Defendants had an option to reject the restrictions early release entailed, by not seeking parole; the time remaining on the original sentence, and not the new violation defined the revocation "sentence"; and, consistently with the regime's rehabilitative focus, reimprisonment was itself temporary, given future parole opportunities. When this Court and others described parole revocation as a deprivation of "conditional liberty," *Morrissey*, 408 U.S. at 483, they were not speaking in a loose or metaphorical way: A defendant achieved absolute liberty once he had completed serving his full sentence; "conditional liberty" referred to the time spent outside prison, by virtue of a paroling authorities' decision to release him early.

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posture. But those defendants could not be required to serve more than the sentence imposed, which could not exceed the maximum authorized.

[5] Among the complaints leveled at this regime were that initial sentencing inscrutable, unpredictable, and nonuniform; that parole authorities exercised releasing discretion arbitrarily and discriminatorily and likewise treated those under supervision unequally. *See, e.g.*, M. Frankel, Criminal Sentences: Law Without Order (1973).

Persons subject to supervised release under present law are not given the benefit of early release. Release is nondiscretionary; the defendant must have served the entire prison sentence his conviction was determined to warrant (minus good time credit), at which point 18 U.S.C. § 3624(a) mandates he be released (or on the proceeding Friday, if the term ends on a weekend). Persons on supervised release are not, as the Government implies, "allow[ed]," U.S. Br. 5, to serve "part of," *id.*, their prison terms at liberty, "on a promise" to not violate conditions, *id.* 38. Respondent's conditions were imposed, not accepted and would have been no less binding had he *not* "signed th[em]...and acknowledged the consequences for violating them." *Id.* 9. Whereas under the parole system, no person revoked could serve more time in prison than the term originally imposed, now every person who is incarcerated as a consequence of a supervised release violation is serving time in addition to his prison term.

Nor, despite the Government's mantra-like repetition of the phrase, does the fact that the liberty of persons subject to subsection (k) is *limited*, mean that it is "conditional" in the sense *Morrissey* used that term. When a court "revokes" a defendant's supervised release and sentences him to imprisonment, it is not rescinding or calling back an earlier grant of liberty nor reinstating an unserved portion of the prison sentence imposed on the jury's verdict. Persons on supervised release have "conditional liberty" only in the sense that others in free society does: They enjoy freedom, subject to the condition that it may be taken away if they violate a statute or court order.

The Government is of course correct that persons subject to supervised release, by virtue of that status, do not enjoy the full measure of liberties during the time that "part of the[ir] sentence" operates. Br. 5, (quoting 18 U.S.C. § 3583(a)). But their liberty is not something that has been granted, and the limitations are *imposed*, for non-punitive reasons, upon conviction, in order to improve the defendant's prospects for reintegration, largely in recognition of the legal and social disabilities that those leaving lengthy incarceration experience. S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (a "primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense").

Accordingly, the kinds of restrictions that are commonly imposed post-release that could not be on someone at absolute liberty are ones inherent in advancing the regime's supervisory goals. It is "reasonable," this Court has held, *see Samson, v. California*, 547 U.S. 843 (2006), that persons under rehabilitative supervision are searched more readily than those who have regained absolute liberty. But it does not follow—and it is incorrect—that the Fifth and Sixth Amendment rights to a fair and accurate determination of guilt for a different alleged "offense under chapter 109A..." are likewise degraded. Indeed, even with respect to the Fourth Amendment, it is unlikely a police officer's using what would normally be unconstitutionally excessive force would be made reasonable if the arrestee were on federal supervised release.

In fact, the very decisions the Government invokes in support of its status-based theory expose the error of that argument. This rule applied in

Samson and *Knights v. United States*, 534 U.S. 112, (2001), was derived from precedent establishing that prisoners have *no* reasonable privacy expectations, *Hudson v. Palmer*, 468 U.S. 517, 527 (1984); parolees' and probationers' place in the middle of the "continuum" of liberty were held to support correspondingly intermediate privacy rights. But, as explained above, the same class denied Fourth Amendment protection altogether, are understood, universally, to enjoy the full panoply of fair-trial rights if accused of committing crime while serving an incarceration term. (The one seeming exception—prison disciplinary proceedings—is not; as with parole, what is at stake is not additional punishment, but instead withdrawal of previously bestowed "good time credits," *see Wolff v. McDonnell*, 418 U.S. 539(1974); *cf. State ex rel. Bray v. Russell*, 89 Ohio 3d 132 (2000) (invalidating "bad-time" credit statute on state constitutional grounds)). The Constitution is not reasonably construed as requiring that all trial safeguards be accorded a defendant charged with a brutal killing while serving his homicide sentence in prison, but countenancing subsection (k), which authorizes life imprisonment if a judge finds it more likely than not that a defendant who *completed* a prison sentence committed a Class C felony.[6]

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[6] On the Government's theory, Congress could provide for a death sentence to be imposed based on a judge's finding of guilt for homicide at a "revocation" hearing for a defendant on supervised release for a Class E felony. That, too, would not be punishment or a "Prosecution," but a mere "administration of a previously imposed sentence" based on "post-judgment facts." The unlikelihood the Government would be "[]willing[]to follow its premise to that logical conclusion suggests that the premise itself is flawed." U.S. Br.47.

The Government at points floats the notion that the present system is not merely *like* prior regimes; but in fact *is*, in substance, a form of probation—a "split" sentence, where the defendant serves a first part in prison and a second "part" is suspended and served, "provisionally," Br. 5, outside. That is not the regime the Congress enacted or the one the Government previously described to this Court, and it would raise far-ranging problems in the vast run of federal criminal cases where a supervised release term is imposed. It would be startling enough that a statute enacted to "make[] all sentences basically determinate," *Mistretta*, 488 U.S. at 367, in fact established a regime where almost every convicted defendant receives a paradigmatic *indeterminate* sentence. But more important, treating the supervised release "part" of the sentence as if it were a suspended prison term would render unlawful sentences imposed routinely in the federal system, including the one here: In jurisdictions that permit split sentences, a sentence of three years in prison plus an additional ten years suspended is *impermissible* if the statutory maximum sentence is ten. *See, e.g.*, *Jones v. Florida*, 608 So.2d 797, 800 (1992); *Louisiana v. Brown*, 645 So.2d 1282 (La. App. 4 Cir. 1994).

But as the Government explained to the Court in *Johnson*, the supervised release term, is not imposed as punishment. Rather, its "dominant purpose" is "to afford offenders assistance in reintegration into society and rehabilitation." Br. U.S., No. 99-5153, at 15. A court's authority to revoke and further incarcerate is not central to the regime; but rather an incident Congress included to better accomplish the regime's nonpunitive purposes. *Id.* 27. Indeed, the fact that initial versions of the Sentencing Reform Act

omitted any mechanism for enforcing compliance with conditions itself attests that Congress saw supervision as an end in itself and refutes the suggestion that it had re-enacted parole. *See* Doherty, 88 N.Y.U. L.J. at 999.

Since Congress enacted what is now subsection (e)(3), providing further imprisonment as an available response to violations, it has taken care to ensure that revocation proceedings not become an alternative mechanism for punishing violations of criminal law that happen to occur while the person is under supervision. First, Congress enacted the limitations in subsection (e)(3) of the statute, which establish maximum terms of incarceration of one, two or three, or five years, depending on the severity of the defendant's offense of conviction. These ceilings, which are a small fraction of the sentences provided for the corresponding offenses, see 18 U.S.C. § 3559(a), signal that incarceration is not meant to be—and cannot supply—punishment for a serious or recidivist offense. And these finite and relatively low ceilings are suited to the informal and holistic character of the proceeding at which sanctions are decided.

That signal is reinforced by the fact that the graduated maximums are linked to the seriousness of the conviction offense, not the conduct underlying the violation. And it is further reaffirmed by the broad discretion courts are granted: they need not revoke in response to every proven violation, or impose the maximum when they do decide to order incarceration. Congress conspicuously omitted "the need for just punishment," 18 U.S.C. § 3559(a)(2)(A), from the list of considerations to be taken into account when imposing supervised release and when deciding

whether and how to respond to violations—on the understanding that the defendant's original prison term would have fully accounted for that. See 18 U.S.C. § 3583(c), (e). Congress further directed courts to take account of the individual's educational, medical, and vocational needs and "impose a sentence sufficient, [that is] but not greater than necessary." *id.* § 3553(a)(2)(D), (a).

Finally, as the Government emphasized in *Johnson*, the power to sanction may not be understood in isolation from "the other powers granted to the district court in Section 3583(e), all of which are designed to ensure a successful transition for the defendant from prison to society outside prison...The district court [is] granted a continuing supervisory authority, during the entire period of supervised release, to monitor the progress of the offender and to adjust the conditions of supervised release to assure his successful reentry into the community." *Johnson* Br. 27.

That is largely how the regime operated when this Court decided *Johnson*. And that is how it operates with respect to every defendant on supervised release *except* those in respondent's position. Subsection (k), of course, does none of this. It strips district courts of all discretion, mandating that revocation occur, without regard to considerations a court is otherwise required to consider, 18 U.S.C. § 3583(e), and a lengthy prison sentence be imposed—not "a short period of reimprisonment, followed by a new opportunity ... to achieve successful reintegration," *Johnson* Br. 31. Life sentences aside, the subsection (k) *minimum* equals the maximum that may be imposed on *any* defendant convicted of Class A felonies who commits a second (or third) Class A

felony on supervised release. And punishment is tied exclusively to the "offense" the defendant is alleged to have committed while on supervised release.

In light of this, it is unsurprising that the Government does not echo the dissenting opinion below in claiming that this Court's *Johnson* decision "already" acquitted the subsection (k) regime of violating the Sixth Amendment. See Pet. App. 34a. Neither subsection (k), which was enacted in 2006, nor any provision like it was before the Court when *Johnson* was decided. Nor was *any* provision of Section 3583(e) challenged on Sixth Amendment grounds. (Because the principal ground for revocation was Johnson's recent state court conviction, 529 U.S. at 697, no plausible Sixth Amendment challenge could have been raised, *see Almendarez-Torres*). Indeed, the petitioner raised no challenge, constitutional or otherwise, to the incarceration portion of his revocation sentence. The only issue before the Court concerned court-imposed *supervision*: whether a district court was prohibited from imposing *further* supervision if it found a violation and sent the defendant to prison. This Court resolved that question on statutory grounds, reasoning that the text of subsection (e)(3) did not require that reading, *i.e.*, that "revoking" supervised release status did not necessarily mean "terminating" it, 529 U.S. at 704, noting that its reading comported with the purposes and design of the supervised release regime, *id.* at 708-10.

The Court did not answer the one constitutional question that was raised: Whether, for Ex Post Facto Clause purposes, a defendant-unfriendly amendment to the supervised release regime should apply to only those whose sentences are imposed thereafter or

whether it may also apply to those whose violation conduct post-dates the amendment. The answer the *Johnson* signaled, that the sanction should be "attribute[d]," 529 U.S. at 701, to the conviction, was the position that both parties urged the Court to adopt, and one of the grounds was that doing so would avoid "serious constitutional difficulties," *id.* at 700.

The Government's inference from that discussion and—that the Court viewed the supervised release revocation regime, including the limited power to incarcerate, as "unproblematic," Br. 21—is not implausible or incorrect. The sanction regime then in effect was more modest than the one that now governs—sentences were limited by both the offense-based ceilings and by "the term of supervised release," imposed on the individual defendant, *id.* at 703, and the subsection(e)(3) ceilings aggregated all revocation imprisonments; the Government took pains to tell the Court its "view... [that] an offender like [Johnson], who was convicted of a Class D felony faces only a maximum of two years' reimprisonment for all ... violations of supervised release," explaining "[a]t some point the district court's authority over an offender [must] come[] to an end." *Johnson* Br. 31 n.24.

But it is utterly implausible to read the Court's opinion as issuing Congress *carte blanche* to insert crimes into Section 3583, smoothing the path to easy—but unreliable and unjust—convictions, by having them occur in "revocation" proceedings. On the contrary, as the court of appeals correctly recognized, the kinds of "serious constitutional problems" that inhere in pursuing punishment for post-conviction conduct through informal revocation hearings are the ones that condemn subsection (k).

III. The Government's Remedial Proposal Should be Rejected

The Government finally posits that, accepting that subsection (k) is unconstitutional, the court of appeals erred in holding it "facially" so, Br. 51, and this Court, "at a minimum," *id.*, should allow the regime to persist, albeit with juries participating in the revocation proceedings.

The Government is wrong. The subsection (k) regime *is* facially unconstitutional, as that term is ordinarily understood—indeed on its most restrictive understanding: There is *no set of defendants* to whom the regime Congress enacted may be constitutionally applied. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). And the Government's proposed "remedy" is neither constitutionally sufficient nor proper.

The constitutional defect of the subsection (k) regime is that it brings the full, maximal power of the criminal law to bear in a proceeding that lacks any of the incidents and protections of a criminal trial, a proceeding in fact designed for entirely different, nonpunitive supervisory purposes. The only plainly adequate remedy for *that* violation one that: requires prosecutors to pursue persons believed to have committed offenses under the enumerated chapters of Title 18 in criminal trials; forbids judges from themselves initiating (and then presiding over) proceedings where defendants face life sentences, ostensibly for breaching the court's trust; and ensures that defendants will not be threatened with a second "independent prosecution," Br. 48, at which the Government pursued further punishment for the same federal offense. *Cf. Dixon*, 509 U.S. at 697 (Opinion of Scalia, J.).

That the violations respondent's Fifth and Sixth Amendment were manifest and sufficient to overturn his sentence is no basis for assuming that the proposed replacement—denying the many historic safeguards—would comply with the Constitution, a requirement for any "remedy" a court could impose. The interests in quick, flexible, and informal hearings that occur under the very different and far less draconian subsection (e)(3) revocation regime, are largely inapplicable and adequate to deny full protections where life-long liberty deprivation is on the table. And cases like this one, where such weighty individual interests are at stake are not the proper forum for conducting experiments in how *little* process may be due.

Moreover, the hybrid proceeding the Government invites the Court to launch would be an untested *judicial* experiment. The statutory scheme does not establish that Congress would readily replace the benefits of a unitary, holistic revocation process, with an as-yet undetermined bi-furcated proceeding, in order to pursue the subsection (k) punishments. The remedy the court of appeals adopted, in contrast, enables the Government both to punish and deter repeat offenses by those on supervised release the same way it addresses re-offense by persons who have regained absolute liberty and those who have not yet attained release—and to address breaches of trust through the same subsection (e)(3) mechanism Congress adjudged adequate for undeniably serious violations.

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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